SINGLE BENCH

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 3187 / 2005

Petitioner / Defendant — Parvatia, Aged About 46 Yrs.
W/o Ramprasad Sahu
R/o Vill. & Panchayat Govinvan,
PS & Teh. Bilaigarh, Distt. Raipur (CG)

VERSUS

Respondents

1. Padmini W/o Jaggannath Kalaar
2. Geetadevi W/o Rajesh Satnami
3. Draupadi Bai Wd./o Santram, Jati Gada
4. Jankibai W/o Labhoram Jati Sahu
5. Renuka W/o Raman Singh Jati Thakur
6. Hembai W/o Hemlal Jati Kalaar

No. 1 – 6 Vill. & Panchayat Govinvan, Teh. Bilaigarh, Distt. Raipur (CG))

7. Presiding Officer, Polling Booth No. 114,
8. Presiding Officer, Polling Booth No. 115

Vill. & Panchayat Govinvan, PS & Teh. Bilaigarh, Distt. Raipur (CG) thro' Tahsildar.

9. Returning Officer Cum Nayab Tahsildar
Teh. Bilaigarh, Distt. Raipur (CG)
10. Sub-Divisional Officer,
Teh. Bilaigarh, Distt. Raipur (CG)

P.R. No. 3326/05
Presented by Shri Rajesh Sharma
dated 15/11/05

R/o 788

WRIT PETITION UNDER ARTICLE 226 / 227 OF THE CONSTITUTION OF INDIA

(84)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.3187 of 2005

Parvatia

- Versus -

Padmini and nine others

POST FOR ORDER ON 31st AUGUST, 2005

Sd/-
L.C.Bhadoo
Judge

(85)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.3187 of 2005

Parvatia

- Versus -

Padmini and nine others

Present: -

Mr. Rajesh Pandey, Advocate:	For the petitioner.
Mr. B.D. Guru, Advocate:	For respondent No.1.
Mr. A.N. Bhakta, Advocate:	For respondent No.5.
Mr. Sandeep Dubey, Govt. Advocate:	For the State/respondents No.9 & 10.

ORDER

(Passed on 31st August, 2005)

L.C. BHADOO, J.

1. By this writ petition under Article 226/227 of the Constitution of India, the petitioner, who had contested election for the post of Sarpanch of Village Panchayat: Govindvan, Tehsil: Bilaigarh, District: Raipur, and was elected as Sarpanch by toss method, as the petitioner and respondent No.1 received equal number of votes in counting, has questioned the legality, propriety and correctness of orders dated 31st March, 2005 and 13th April, 2005 passed by the Specified Officer in Revenue Case No.17-A/151 of 2004-2005, whereby the learned Specified Officer ordered for recount of votes and after recounting, declared respondent No.1 as elected instead of the petitioner.

2. Brief facts leading to filing of this writ petition are that the petitioner herein along with respondents No.1 to 6 herein contested election for the post of Sarpanch of Village Panchayat: Govindvan, Police Station & Tehsil: Bilaigarh, District: Raipur, and for the purpose of casting of votes, two polling booths namely, Polling Booth Nos.114 & 115 were fixed. After counting, the Returning Officer reached the conclusion that the petitioner herein and respondent No.1 herein secured 365 votes each, therefore, he decided to declare the result by toss method and in that toss method, the petitioner herein was declared elected. Thereafter, respondent No.1 herein questioned the said election of the petitioner herein by an election petition

filed on 21-2-2005 under Section 122 of the Chhattisgarh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, on the ground that at the end of counting it was informed that she has won the election by a margin of three votes, and after hearing this, she and her supporters started celebrating victory, however, in the meantime, son of the defeated candidate, the petitioner herein, manipulated the counting in connivance with the Presiding Officers of Polling Booth Nos.114 & 115 that the petitioner and respondent No.1 got equal votes. Thereafter, the learned Specified Officer directed for issuance of notice in the election petition and fixed 9th March, 2005 for hearing. On that day, the petitioner herein was present and the matter was adjourned for 23rd March, 2005 for filing reply. On 23rd March, 2005, the petitioner herein filed reply, but the Specified officer was on tour, therefore, the matter was fixed for hearing on 31st March, 2005. On 31st March, 2005, affidavits were filed on behalf of respondent No.1 herein in support of the election petition, and it was ordered that since the petitioner in the election petition has requested for recount, same is accepted and the Tehsildar wad directed to bring the ballot boxes. The matter was fixed on 13-4-2005, on that day, votes were recounted in which respondent No.1 herein secured nine votes more than the petitioner herein. Thereafter, the petitioner herein preferred a revision before the Additional District Magistrate, who held that revision is not maintainable, as such, the petitioner has approached this Court by filing the instant writ petition No.3187/2005.

3. The petitioner has questioned the order of recount and also the recount on the ground that the order of the Specified Officer is vague, perverse in law and not supported by the facts, same has been passed without applying the mind and without following the law regarding recounting of votes, without giving proper notice and opportunity of hearing, and disposed of the matter in a summary manner without giving opportunity to the petitioner herein for adducing evidence and presenting her case on law and facts.

4. Return has been filed on behalf of respondent No.1 in which preliminary objection has been raised that the order in question has been challenged without raising the grounds and further that the Specified Officer has rightly ordered for recount, same was ordered on the basis of the facts and circumstances enumerated in the election petition.

5. I have heard learned counsel for the parties.

87

6. Mr. Rajesh Pandey, learned counsel for the petitioner argued that the order of recount has been made without following the procedure, without framing issues, without allowing the petitioner to cross-examine the witnesses who filed affidavits and also without giving opportunity to the petitioner to adduce the evidence. In the order dated 31st March, 2005, whereby recount was ordered, no reasons have been assigned and no satisfaction has been recorded by the Specified Officer that the election petitioner has been able to plead and establish the irregularity. He further argued that even on the ground of consent given by the petitioner, the Specified Officer was not authorized to order for recount, without recording satisfaction that grounds for recount are existing and established at the trial.

7. On the other hand, Mr. B.D. Guru, learned counsel for respondent No.1 and Mr. Sandeep Dubey, learned Govt. Advocate for respondents No.9 & 10 argued that recount was ordered on the ground of consent by the petitioner in the reply of the election petition, and even affidavits were filed by the respondent herein in support of the election petition, therefore, the Specified Officer passed the impugned order after satisfying himself and there is no illegality in the said order. Hence, the writ petition is liable to be dismissed.

8. Having heard learned counsel for the parties, I have perused the impugned orders and the relevant case law.

9. Madhya Pradesh High Court in the matter of **Chironjilal v. S.D.O. Vijaypur** reported in **1996 (I) MPWN 109**, after considering the judgment of the Apex Court in the matter of *Dr. Jagjit Singh v. Giani Kartar Singh* (*AIR 1966 SC 773*) held that merely on the basis of consent recount cannot be ordered. Consent would not confer jurisdiction on the Specified Officer, case for recount has to be made out.

10. Similarly, in another matter **Gajanand v. Ramcharan** reported in **1997 (II) MPWN 3**, the Court held that "*it is well settled that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of votes. Consent of parties cannot give jurisdiction to inspect ballots and recount*".

11. In the matter of **Ramdeen Vs. State of M.P. and others** reported in **2002 (3) M.P.H.T. 180**, M.P. High Court has held that the impugned order has been passed without recording the evidence, which cannot be allowed to

stand, and directed the S.D.O. to record the evidence of both the parties as may be adduced and thereafter first to decide the question whether case has been made out for order of recount on the averments and the evidence adduced by the parties.

12. In the matter of **P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen and others** reported in **AIR 1989 SC 640**, in para 15 of the judgment, the Apex Court has held that "*an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes*".

13. In the matter of **Shri Satyanarain Dudhani v. Uday Kumar Singh and others** reported in **AIR 1993 SC 367**, the Apex Court has held that

> "It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

14. In the matter of **P.K.K. Shamsudeen (supra)**, in para 10 the Apex Court has held that

> "Before examining the contentions of the parties we may set out the position in law as regards the need for the secrecy of the ballot being maintained and as to when the well established rule can be departed from. Since the principle of law has already been enunciated by this Court in several cases, we may refer to three of those decisions. In Dr. Jagjit Singh v. Giani Kartar Singh, (1967) 1 SCJ 762 : (AIR 1966 SC 773) the appellant had challenged the election of the first respondent to the Punjab Legislative Assembly. In the recount of votes ordered by the Tribunal it was found that the appellant had secured 22,491 votes and the first respondent had secured 22,412, votes. The Tribunal allowed the election petition and declared the appellant to have been duly elected. The High Court set aside the order of the Tribunal and the judgment of the High Court was confirmed by this Court. In doing so this Court observed as follows (at p. 783 of AIR): -
>
> "Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83 (l) (a) of the Act requires that an election petition shall contain a concise

(89)

statement of the material facts on which the petitioner relied; and in every case, where a prayer is made by a petitioner for the inspector of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relied. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which section 83 (l) (a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory Rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void.""

(Emphasis supplied)

15. In the matter of **Chandrika Prasad Yadav vs. State of Bihar and others** reported in **(2004) 6 SCC 331**, in para 20, the Apex Court has held that

> "It is well settled that an order of re-counting of votes can be passed when the following conditions are fulfilled:
> (i) a prima facie case;
> (ii) pleading of material facts stating irregularities in counting of votes;
> (iii) a roving and fishing inquiry shall not be made while directing re-counting of votes; and
> (iv) an objection to the said effect has been taken recourse to."

16. In the matter of **M. Chinnasamy vs. K.C. Palanisamy and others** reported in **(2004) 6 SCC 341**, the Apex Court has held that it is obligatory on the part of election Tribunal to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting. In para 42 of the judgment the Apex Court has further held that

> "Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings

> would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading."

17. Similarly, in the matter of **Jibontara Ghatowar vs. Sarbananda Sonowal and others** reported in **(2003) 6 SCC 452**, the Apex Court held that

> "Decision on, must be taken by Returning Officer based on prima facie opinion formed in a reasonable manner in the facts and circumstances – When a case for re-count made out on the basis of averments made by election petitioner coupled with breach of statutory duty cast on Returning Officer under R. 63 of Conduct of Elections Rules."

18. Therefore, in view of the above, the settled legal position is that before ordering for recount, the learned Specified Officer was required to see as per Rule 5 of the Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (hereinafter referred to as 'the Rules, 1995'), whether the election petition (a) contains a concise statement of all material facts on which the petitioner relies and (b) set forth with sufficient particulars, the grounds on which the election is called in question, and also to satisfy himself based on the evidence of the parties after conducting the trial that the petitioner has been able to make out a case for recount on the basis of pleadings and evidence.

19. Rule 11 (1) of the Rules, 1995, envisages that

> "Subject to the provisions of these rules, every election petition shall be enquired into by the specified officer as nearly, as may be, in accordance with the procedure applicable under the Code of the Civil Procedure, 1908, to the trial of suits:
>
> Provided that it shall only be necessary for the specified officer to make a memorandum of the substance of the evidence of any witness examined by him."

Rule 12 of the Rules, 1995, envisages that

> "It shall be the duty of the parties to produce their witnesses on the date fixed for evidence, and they shall not be entitled to an adjournment for non-attendance of their witnesses."

20. In the light of the above legal position, if we examine the facts of the present case as has been mentioned in the earlier part of this order, the election petition was placed before the Specified Officer for the first time on 21-2-2005 on which day he directed issuance of notice. On 9-3-2005, the petitioner herein put in her appearance. On 23-3-2005 return was filed and

on that day, as the Specified Officer was on tour, the matter was adjourned for 31-3-2005. On 31-3-2005 certain affidavits were filed on behalf of the election petitioner, and thereafter, learned Specified Officer observed that a request has been made by the petitioner for recounting, therefore, the request for recounting is accepted and the Specified Officer by order dated 31-3-2005, directed the Tehsildar to produce the ballots. Perusal of the above order shows that the same has been passed by learned Specified Officer without framing issues regarding the dispute and without allowing the petitioner herein to cross-examine the witnesses of respondent No.1 herein whose affidavits were filed in support of the election petition. Even the opportunity for adducing evidence was not given to the petitioner and even the arguments were also not heard. Therefore, there was total non-compliance of Rule 11 of the Rules, 1995. Moreover, it has not been mentioned in the order dated 31-3-2005 that the Specified Officer was satisfied after considering the evidence and material on record that some irregularity took place in counting, therefore, the recount is necessary. Merely on the basis of consent given by the returned candidate in the return, that consent cannot confer jurisdiction on the Specified Officer for ordering recount. Even in the order dated 31-3-2005 this fact has also not been mentioned.

21. Therefore, for the foregoing reasons, I am of the opinion that the order for recount made by learned Specified Officer is no order in the eye of law, as the same has been passed contrary to the legal provisions and established principles of law, which are referred in the earlier part of this order.

22. In the result, the petitioner's petition deserves to be allowed and the same is allowed. The orders impugned are quashed. The matter is remitted back to the Specified Officer to proceed with the matter and decide the same after giving opportunity to the parties to adduce their evidence and cross-examine the witnesses of other parties, and also after hearing the arguments decide the matter, in accordance with law. No costs.

Sd/-
L.C.Bhadoo
Judge

Soma